


Item J5
Petition for Amendment
of Regulation 1521

Memorandum

To: Honorable John Chiang, Chair
Honorable Claude Parrish, Vice Chairman
Ms. Betty T. Yee, Acting Board Member
Honorable Bill Leonard
Honorable Steve Westly

Date: May 5, 2006

From: Kristine Cazadd
Chief Counsel 

Subject: **Petition for Amendment of Sales and Use Tax Regulation 1521, *Construction Contractors***

Chief Counsel Matters – Wednesday, May 17, 2006

Issue

On March 17, 2006, the Board received a petition from Les Nelson, Executive Director of the California Solar Energy Industries Association. The petition was filed pursuant to the authority contained in Government Code section 11340.6, and requested that the Board amend California Code of Regulations, title 18, section 1521 (Regulation 1521), *Construction Contractors*, to update and provide clarity for solar energy contractors and integrators who design, assemble, and install photovoltaic energy systems in California. The petition did not propose specific language for the amendments, however, specific language was submitted on May 3, 2006.¹ Mr. Nelson waived his right under the statute to have the Board decide this matter within thirty days. This matter is thus scheduled to be heard on the Chief Counsel Rulemaking Calendar on May 17, 2006.

Recommendation

The May 3, 2006, submission requests that the Board add language to Regulation 1521, subdivision (a)(4), and Appendix A, which would provide that photovoltaic cells and solar panels are “materials” when furnished and installed pursuant to a construction contract. (See attached strikeout and underline version of Regulation 1521.) Given the high level of both public and private interest in current solar technologies, including pending legislation, and the fact that proposed regulatory language has been provided, staff recommends that the Board grant relief by initiating the expedited rule-making process and direct the Legal Department in coordination with the business taxes staff to schedule an interested parties meeting for consideration of petitioner’s proposed language and other available options.

¹ Copies of the petition, Government Code section 11340.6, and Regulation 1521 are attached.

Background

The petition arises out of a lack of specific guidance in Regulation 1521 and the Legal Department's annotations² regarding the application of sales and use tax to contracts for the sale and installation of photovoltaic energy systems. Neither Regulation 1521 nor the Legal Department's annotations specify whether specific items of tangible personal property that might be transferred pursuant to such contracts are "materials," "fixtures," or "machinery and equipment."

Grounds for the Petition

The petition sets forth three grounds for the requested amendments:

1. Unnecessary Costs and Burdens on Contractors and Integrators.

The petition indicates that solar energy contractors and integrators who sell and install photovoltaic energy systems may be incurring unnecessary costs and expenses trying to determine the appropriate application of sales and use tax to their contracts.

2. Encourage Equal Treatment of Contractors and Integrators Throughout the State and Reduce the Risk of Doing Business.

The petition raises the concern that solar energy contractors and integrators who sell and install photovoltaic energy systems may not be treated equally throughout the state because of a lack of guidance to the Board's various field offices. The petition also raises a concern that the guidance currently being provided by the Board's various field offices may change, and thereby retroactively increase solar energy contractors' and integrators' cost of doing business.

3. Support State-Wide Plans to Expand the Use of Photovoltaic Energy.

The petition also points out that the California Public Utilities Commission recently passed the California Solar Initiative, which provides for a 10-year, \$2.9 billion program to increase the amount of solar energy generated on California's rooftops by 3000 megawatts by 2017. The petition indicates that the amendments being requested would improve the likelihood of success for the California Solar Initiative by making it less risky for solar energy contractors and integrators to enter into contracts for the sale and installation of photovoltaic energy systems.

² Legal Department annotations are summaries of the conclusions reached in selected legal rulings, which are published in either the Business Taxes Law Guide or the Property Taxes Law Guide. Annotations do not embellish or interpret the legal rulings of counsel which they summarize, and do not have the force and effect of law. (Cal. Code. Regs., tit. 18, § 5200.)

Additional Information

Assembly Member Hancock introduced Assembly Bill No. 2806 (2005-2006 Reg. Sess.) (A.B. 2806) on February 24, 2006. As originally introduced, A.B. 2806 would have required the Board to treat all construction contractors as the consumers of solar energy systems furnished and installed pursuant to a construction contract. As amended on March 27, 2006, A.B. 2806 would require the Board to treat solar panels and photovoltaic cells included in a solar energy system as “materials” when furnished and installed pursuant to a construction contract. A.B. 2806 is currently in the Assembly Revenue and Taxation Committee.

Options for Board Action

Pursuant to Government Code section 11340.7, upon receipt of a petition requesting the amendment or repeal of a regulation, the Board shall:

1. Deny each petition, in whole or in part, indicating in writing why the Board has reached its decision on the merits of the petition; or
2. Initiate the rulemaking process by scheduling the matter for a public hearing in accordance with the rulemaking provisions of the Administrative Procedures Act (Gov. Code, § 11346 et seq.).

If the Board decides to initiate the rulemaking process, it may, prior to setting the public hearing date and authorizing publication of the hearing notice, hold public discussions of the proposal. (Gov. Code, § 11346.45.) In order to facilitate public discussion, the Board may refer the matter to the Business Taxes Committee process, or may direct staff to initiate the expedited rule-making process and schedule an interested parties meeting. Alternately, the Board may grant any other relief or take other action it may determine to be warranted by the petition, such as ordering the Legal Department to prepare a legal opinion of the issues raised. (Gov. Code, § 11340.7, subd. (b).)

Given the high level of both public and private interest in current solar technologies, including pending legislation, and the fact that proposed regulatory language has been provided, staff recommends that the Board grant relief by initiating the expedited rule-making process and direct the Legal Department in coordination with the business taxes staff to schedule an interested parties meeting for consideration of petitioner’s proposed language and other available options.

Staff is available to provide additional information and to render whatever assistance the Board may require in making its decision. If you have any questions on these matters, please contact Acting Assistant Chief Counsel, Bob Lambert at (916) 324-6593.

BH:ef

Attachments: Petition of Les Nelson
 Government Code Section 11340.6
 Government Code Section 11340.7
 Regulation 1521, *Construction Contractors* (Strikeout and Underline Version)

cc: Mr. Ramon Hirsig MIC: 73
 Ms. Randie L. Henry MIC: 43
 Mr. Bob Lambert MIC: 82
 Mr. Randy Ferris MIC: 82
 Mr. Bradley M. Heller MIC: 82

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STATE BOARD OF EQUALIZATION
MAR 22 PM 4:19



CALIFORNIA SOLAR ENERGY INDUSTRIES ASSOCIATION

March 13, 2006

Honorable John Chiang, Chair
State Board of Equalization
450 N Street
Sacramento, CA 95814

RECEIVED

MAR 17 2006

by EXECUTIVE DIRECTOR'S OFFICE
STATE BOARD OF EQUALIZATION

Dear Mr. Chiang:

On behalf of the California Solar Energy Industry Association (CAL SEIA), we write to request the Board of Equalization open a formal rulemaking process to review and update Regulation 1521, relating to Construction Contractors. The definitions and Appendix contained in the Regulation, as it applies to the solar industry, have not been updated since the 1970's, and thus do not reflect current solar technology and the methods by which solar energy systems are installed in residential and commercial buildings today in California. Specifically, the reasons for this request are to encourage the following:

1. Regulatory Clarity
2. Equal Treatment
3. Administrative Efficiency

Background of Issue

The California solar industry has seen tremendous growth in recent years, stemming from the desire of consumers to invest in clean, on-site, reliable, and cost effective energy resources. Advancements in solar technology and increased global production levels over the past decade have made photovoltaic (PV) technology cost-effective in locations, like the State of California, with supportive public policies. Improved system design allows consumers, including residents, business, and government entities, to integrate PV systems and solar thermal systems into the building structure and/or other construction materials in new, innovative ways that improve the appearance and functionality of solar generation.

Solar contractors and integrators who design, assemble and install solar systems consider themselves "construction contractors" furnishing and installing building or construction materials. California construction contractors include a significant number of small business owners who operate on relatively small profit margins. These contractors do the best they can to understand and interpret the rules and regulations that govern their industry as set forth in California Revenue and Taxation, Regulation 1521, Construction Contractors (copy enclosed). The State Board of Equalization (SBE) oversees the California Sales and Use Tax Program.

The application of California Sales and Use Tax to construction contractors is one of the most complex areas of the sales and use tax law. It is difficult for even the most sophisticated taxpayer to understand and interpret. Added to this complexity is the fact that the regulation does not specifically call out the

treatment of solar technology. This omission has the potential to impose unnecessary costs and administrative burdens on solar construction contractors seeking to meet growing consumer demand and ambitious California state policy objectives.

Regulation 1521 Does Not Address Solar Technology

Regulation 1521 sets out rules and definitions for the proper application of sales and use tax for the construction industry. The application of sales and use tax for construction contractors is based on several factors:

1. First, the type of property being furnished and installed (i.e. materials, fixtures and/or machinery and equipment);
2. Second, how the property is purchased by the contractor (i.e. sales tax paid to their vendors, or without sales tax); and
3. Finally, the type of contract entered into with their customers (i.e. lump-sum, cost plus a fee, time and materials or time and materials plus tax on the materials).

The type of property being furnished and installed governs how the tax applies. Regulation 1521, sections (a)(4) and (a)(5) defines materials and fixtures:

Section (a)(4):

“Materials” means and includes construction materials and components, and other tangible personal property incorporated into, attached to, or affixed to, real property by contractors in the performance of a construction contract and which, when combined with other tangible personal property, loses its identity to become an integral and inseparable part of the real property.

Section (a)(5):

“Fixtures” means and includes items which are accessory to a building or other structure and do not lose their identity as accessories when installed.

Significantly, Regulation 1521 is not clear and specific as to how it is applicable to solar materials, and to solar contractors and integrators. In addition, there is a large body of related annotations^[1] related to Regulation 1521; here again, there is no general or specific guidance related to the solar energy industry. The lack of clarification creates ambiguity and confusion in terms of how solar contractors and integrators are to comply with Regulation 1521.

Regulatory Clarity would Encourage Equal Treatment

As stated, solar contractors have historically considered themselves construction contractors furnishing and installing building and construction materials. As such, they have been paying sales and use tax on the cost of the materials. In fact, many contractors are not registered with the State Board of Equalization (SBE) on the advice of the SBE. A construction contractor furnishing and installing materials is generally not required to hold a seller’s permit. The absence of annotations surrounding

^[1] "Annotations" are published in either the Business Taxes Law Guide or the Property Taxes Law Guide and are summaries of the conclusions reached in selected legal rulings of counsel. Annotations do not embellish or interpret the legal rulings of counsel which they summarize and do not have the force and effect of law

solar materials, and the proper application of the tax, would support solar contractors who are installing materials and are properly reporting and/or paying tax on the cost of the solar materials.

However, without clarification to Regulation 1521, section (a)(4) and (a)(5) that a solar system is a "material", and not a "fixture", these contractors are exposed to the risk that this tax interpretation and application could be reversed, or changed, resulting in new, unforeseen costs to California's solar industry, particularly small business owners.

A simple change in interpretation on the part of a tax auditor could result in a solar contractor being treated differently than other solar contractors. Clarity in the rules will provide both solar contractors and tax auditors with a firm basis on how the rules should be applied, ensuring fair treatment for all solar contractors.

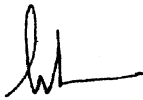
Administrative Efficiency Needed to Manage Growth of Industry

In January 2006, the State of California adopted rules to increase and extend solar customer incentive payments as part of the California Solar Initiative (CSI). The goal of the CSI is to bring an additional 3,000 MW of PV to the California market, up from the current 120 MW that have been installed in the State to date. With this planned growth in customer-sited solar energy, it is critical to provide solar contractors with clear guidance as to the proper application of state sales and use taxes to their materials and operations.

Lack of clear tax language may create unnecessary burdens, unequal treatment, and tax liability for solar construction contractors. Tax auditors are left with little or no guidance when it comes to determining if solar materials are materials or fixtures. The impact may result in taxes being assessed against some contractors based on historical transactions (up to 8 years for those who were told they did not need a permit by Board of Equalization field offices). The small business owner has no ability to go back and recover the additional cost from their customers. For many small business owners, the impact could be so significant as to jeopardize their ability to continue on in business in California.

The California Solar Energy Industry Association appreciates your timely attention to this important issue.

Sincerely,



Les Nelson, Executive Director, CAL SEIA

cc: Honorable Bill Leonard, Member, State Board of Equalization
Honorable Claude Parrish, Member, State Board of Equalization
Honorable Steve Westly, Controller, State of California and Member,
State Board of Equalization
Honorable Betty T. Yee, Member, State Board of Equalization
Barry Cinnamon, President, CAL SEIA Board of Directors

Cal Gov Code § 11340.6

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 *** THROUGH 2006 CH. 15, APPROVED 3/29/06 ***

GOVERNMENT CODE
 TITLE 2. Government of the State of California
 DIVISION 3. Executive Department
 PART 1. State Departments and Agencies
 CHAPTER 3.5. Administrative Regulations and Rulemaking
 ARTICLE 1. General

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Gov Code § 11340.6 (2006)

§ 11340.6. Petition requesting adoption, amendment, or repeal of regulation; Contents

Except where the right to petition for adoption of a regulation is restricted by statute to a designated group or where the form of procedure for such a petition is otherwise prescribed by statute, any interested person may petition a state agency requesting the adoption, amendment, or repeal of a regulation as provided in Article 5 (commencing with Section 11346). This petition shall state the following clearly and concisely:

- (a) The substance or nature of the regulation, amendment, or repeal requested.
- (b) The reason for the request.
- (c) Reference to the authority of the state agency to take the action requested.

History:

Added Stats 1994 ch 1039 § 5 (AB 2531).

Notes:

Historical Derivation:

- (a) Former Gov C § 11347, as added Stats 1979 ch 567 § 1.
- (b) Former Gov C § 11426, as added Stats 1947 ch 1425 § 11, amended Stats 1957 ch 1751 § 3, Stats 1977 ch 538 § 1.

Collateral References:

Commission orders: 2 Cal Code Reg § 1189.2.

Notes of Decisions:**Practitioner's Toolbox**

[History](#)

[Notes](#)

[Notes of Decisions](#)

Resources & Practice Tools**Collateral References**

> Commission orders: 2 Cal Code Reg § 1189.2.

In an action brought by the California Medical Association challenging the validity of certain emergency Medi-Cal regulations, the trial court did not err in entering judgment in favor of parties who intervened as well as in favor of the medical association, even though the interveners had not first applied for administrative relief as required by former Gov C § 11426 (see now Gov C § 11340.6), where the medical association had filed an administrative petition which was denied prior to the time the complaints in intervention were filed. An exception to the general rule of exhaustion of administrative remedies is inadequacy of administrative relief. *California Medical Asso. v Brian* (1973, 3rd Dist) 30 Cal App 3d 637, 106 Cal Rptr 555.

A licensed optometrist who was ineligible for membership of a nonprofit corporation (organized to provide group vision care and subject to the supervision of the State Board of Optometry) because of his insistence on maintaining a box advertisement in the telephone directory was procedurally entitled to seek a writ of mandate and declaratory relief against the board to have the advertising prohibition stricken without first requesting the board, under Gov C § 11426 (see now Gov C § 11340.6), to adopt a regulation to that end and without first applying for membership of the corporation. The statute does not constitute a mandatory method for the resolution of complaints such as to bring it within the doctrine of exhaustion of administrative remedies, which, in any event, would have proved futile, both the board and the corporation having already made clear that no remedial action would be forthcoming. *Jacobs v State Board of Optometry* (1978, 3rd Dist) 81 Cal App 3d 1022, 147 Cal Rptr 225.

In a class action on behalf of numerous hospitals as plaintiffs for declaratory relief and damages in connection with a directive of the Director and the Department of Health that reduced by 10 percent Medi-Cal reimbursements for hospital outpatient services, the trial court erred in its finding, in support of its order for partial summary judgment for plaintiffs specifying the invalidity of the cutbacks, that due to the director's noncompliance with the requirements of the Administrative Procedure Act the 10 percent cutback provided for under the directive was invalid. The language in and the legislative history of the version of the statute then in effect relating to the director's authority to implement a 10 percent cutback in payments for medical services under specified emergency circumstances (W & I C § 14120, subd. (c); Stats 1968, ch. 1241, p. 2350) made it apparent his authority was not to be slowed by the unnecessary procedures of the Administrative Procedure Act. W & I C § 14120, subd. (c), is a specific provision relating to a particular, narrow subject, and as such is to be treated as an exception to or as exempt from the general provisions of the Administrative Procedure Act. *Alta Bates Hospital v Lackner* (1981, 3rd Dist) 118 Cal App 3d 614, 175 Cal Rptr 196.

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GOVERNMENT CODE
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CHAPTER 3.5. Administrative Regulations and Rulemaking
ARTICLE 1. General

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Cal Gov Code § 11340.7 (2006)

§ 11340.7. Procedure upon petition requesting adoption, amendment or repeal of regulation

(a) Upon receipt of a petition requesting the adoption, amendment, or repeal of a regulation pursuant to Article 5 (commencing with Section 11346), a state agency shall notify the petitioner in writing of the receipt and shall within 30 days deny the petition indicating why the agency has reached its decision on the merits of the petition in writing or schedule the matter for public hearing in accordance with the notice and hearing requirements of that article.

(b) A state agency may grant or deny the petition in part, and may grant any other relief or take any other action as it may determine to be warranted by the petition and shall notify the petitioner in writing of this action.

(c) Any interested person may request a reconsideration of any part or all of a decision of any agency on any petition submitted. The request shall be submitted in accordance with Section 11340.6 and include the reason or reasons why an agency should reconsider its previous decision no later than 60 days after the date of the decision involved. The agency's reconsideration of any matter relating to a petition shall be subject to subdivision (a).

(d) Any decision of a state agency denying in whole or in part or granting in whole or in part a petition requesting the adoption, amendment, or repeal of a regulation pursuant to Article 5 (commencing with Section 11346) shall be in writing and shall be transmitted to the Office of Administrative Law for publication in the California Regulatory Notice Register at the earliest practicable date. The decision shall identify the agency, the party submitting the petition, the provisions of the California Code of Regulations requested to be affected, reference to authority to take the action requested, the reasons supporting the agency determination, an agency contact person, and the right of interested persons to obtain a copy of the petition from the agency.

History:

Added Stats 1994 ch 1994 ch 1039 § 6 (AB 2531).

Practitioner's Toolbox

[History](#)

[Notes](#)

Resources & Practice Tools**Collateral References**

> Commission orders: 2 Cal Code Reg
§ 1189.2.

[More...](#)

Notes:

Historical Derivation:

(a) Former Gov C § 11347.1, as added Stats 1979 ch 567 § 1, amended Stats 1980 ch 1238 § 4, Stats 1991 ch 899 § 2.

(b) Former Gov C § 11427, as added Stats 1947 ch 1425 § 11, amended Stats 1977 ch 538 § 2, Stats 1979 ch 373 § 132.

Collateral References:

Commission orders: 2 Cal Code Reg § 1189.2.

Attorney General's Opinions:

Compliance of fish and game orders first with Fish and Game Code, then with Government Code where possible. 10 Ops. Cal. Atty. Gen. 275.

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18 CCR 1521

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TITLE 18. PUBLIC REVENUES
DIVISION 2. STATE BOARD OF EQUALIZATION--BUSINESS TAXES
CHAPTER 4. SALES AND USE TAX
ARTICLE 2. CONTRACTORS AND SUBCONTRACTORS

18 CCR 1521 (2006)

§ 1521. Construction Contractors

(a) Definitions.

(1) Construction Contract.

(A) "Construction contract" means and includes a contract, whether on a lump sum, time and material, cost plus, or other basis, to:

1. Erect, construct, alter, or repair any building or other structure, project, development, or other improvement on or to real property, or
2. Erect, construct, alter, or repair any fixed works such as waterways and hydroelectric plants, steam and atomic electric generating plants, electrical transmission and distribution lines, telephone and telegraph lines, railroads, highways, airports, sewers and sewage disposal plants and systems, waterworks and water distribution systems, gas transmission and distribution systems, pipelines and other systems for the transmission of petroleum and other liquid or gaseous substances, refineries and chemical plants, or
3. Pave surfaces separately or in connection with any of the above works or projects, or
4. Furnish and install the property becoming a part of a central heating, air-conditioning, or electrical system of a building or other structure, and furnish and install wires, ducts, pipes, vents, and other conduit imbedded in or securely affixed to the land or a structure thereon.

(B) "Construction contract" does not include:

1. A contract for the sale or for the sale and installation of tangible personal property such as machinery and equipment, or
2. The furnishing of tangible personal property under what is otherwise a construction contract if the person furnishing the property is not responsible under the construction contract for the final affixation or installation of the property furnished.

(2) Construction Contractor. "Construction contractor" means any person who for himself or herself, in conjunction with, or by or through others, agrees to perform and does perform a construction contract. "Construction contractor" includes subcontractors and specialty contractors and those engaged in such building trades as carpentry, bricklaying, cement work, steel work, plastering, drywall installation, sheet metal work, roofing, tile and terrazzo work, electrical work, plumbing, heating, air-conditioning, elevator installation and construction, painting, and persons installing floor coverings, including linoleum, floor tile,

and wall-to-wall carpeting, by permanently affixing such coverings to a floor. "Construction contractor" includes any person required to be licensed under the California Contractors' State License Law (Business & Professions Code Sections 7000 et seq.), and any person contracting with the United States to perform a construction contract, whether such persons are formed or organized under the laws of this state, or another state or country.

(3) United States Construction Contractor. "United States construction contractor" means a construction contractor who for himself or herself, in conjunction with, or by or through others, agrees to perform and does perform a construction contract for the United States Government.

(4) Materials. "Materials" means and includes construction materials and components, and other tangible personal property incorporated into, attached to, or affixed to, real property by contractors in the performance of a construction contract and which, when combined with other tangible personal property, loses its identity to become an integral and inseparable part of the real property. A list of typical items regarded as materials is set forth in Appendix A.

(5) Fixtures. "Fixtures" means and includes items which are accessory to a building or other structure and do not lose their identity as accessories when installed. A list of typical items regarded as fixtures is set forth in Appendix B.

(6) Machinery and Equipment. "Machinery and equipment" means and includes property intended to be used in the production, manufacturing or processing of tangible personal property, the performance of services or for other purposes (e.g., research, testing, experimentation) not essential to the fixed works, building, or structure itself, but which property incidentally may, on account of its nature, be attached to the realty without losing its identity as a particular piece of machinery or equipment and, if attached, is readily removable without damage to the unit or to the realty. "Machinery and equipment" does not include junction boxes, switches, conduit and wiring, or valves, pipes, and tubing incorporated into fixed works, buildings, or other structures, whether or not such items are used solely or partially in connection with the operation of machinery and equipment, nor does it include items of tangible personal property such as power shovels, cranes, trucks, and hand or power tools used to perform the construction contract. A list of typical items regarded as machinery and equipment together with a list of typical items not regarded as machinery and equipment is set forth in Appendix C.

(7) Time and Material Contract. "Time and material contract" means a contract under which the contractor agrees to furnish and install materials or fixtures, or both, and which sets forth separately a charge for the materials or fixtures and a charge for their installation or fabrication.

(8) Lump Sum Contract. "Lump sum contract" means a contract under which the contractor for a stated lump sum agrees to furnish and install materials or fixtures, or both. A lump sum contract does not become a time and material contract when the amounts attributable to materials, fixtures, labor, or tax are separately stated in the invoice.

(b) Application of Tax.

(1) United States Construction Contractors.

(A) Materials and Fixtures. United States construction contractors are consumers of materials and fixtures which they furnish and install in the performance of contracts with the United States Government. Either the sales tax or the use tax applies with respect to sales of tangible personal property (including materials, fixtures, supplies, and equipment) to contractors for use in the performance of such contracts with the United States for the construction of improvements on or to real property in this state. The fact that the contract

may provide principally for the manufacture or acquisition of tangible personal property is immaterial. The sales tax, but not the use tax, applies even though the contractor purchases the property as the agent of the United States.

(B) Machinery and Equipment. United States contractors are retailers of machinery and equipment furnished in connection with the performance of a construction contract with the United States Government. Tax does not apply to sales of machinery and equipment to United States contractors or subcontractors, provided title to the property passes to the United States before the contractor makes any use of it. Such sales are sales for resale, and the purchasing contractor may issue a resale certificate. A contractor who uses the machinery or equipment before title passes to the United States is the consumer of that machinery or equipment and either sales tax or use tax applies with respect to the sale to or the use by the contractor.

(2) Construction Contractors Other than United States Construction Contractors.

(A) Materials.

1. In General. Construction contractors are consumers of materials which they furnish and install in the performance of construction contracts. Either sales tax or use tax applies with respect to the sale of the materials to or the use of the materials by the construction contractor.

2. When Contractor is Seller. A construction contractor may contract to sell materials and also to install the materials sold. If the contract explicitly provides for the transfer of title to the materials prior to the time the materials are installed, and separately states the sale price of the materials, exclusive of the charge for installation, the contractor will be deemed to be the retailer of the materials.

In the case of a time and material contract, if the contractor bills his or her customer an amount for "sales tax" computed upon his or her marked up billing for materials, it will be assumed, in the absence of convincing evidence to the contrary, that he or she is the retailer of the materials.

If the sale occurs in this state, the sales tax applies to the contractor's (retailer's) gross receipts from the sale of the materials. If the sale occurs prior to the time the property is brought into this state, the contractor's (retailer's) customer is the consumer and his or her use (unless otherwise exempt) is subject to use tax measured by the sales price. The contractor must collect the use tax and pay it to this state.

(B) Fixtures.

1. In General. Construction contractors are retailers of fixtures which they furnish and install in the performance of construction contracts and tax applies to their sales of the fixtures.

2. Measure of Tax.

a. In General. If the contract states the sale price at which the fixture is sold, tax applies to that price. If the contract does not state the sale price of the fixture, the sale price shall be deemed to be the cost price of the fixture to the contractor.

b. Determining Cost Price.

If the contractor purchases the fixtures in a completed condition, the cost price is deemed to be the sale price of the fixture to him or her and shall include any manufacturer's excise tax or import duty imposed with respect to the fixture prior to its sale by the contractor.

If the contractor is the manufacturer of the fixture, the cost price is deemed to be the price at which similar fixtures in similar quantities ready for installation are sold by him or her to other contractors.

If similar fixtures are not sold to other contractors ready for installation, then the cost price shall be deemed to be the amount stated in the price lists, bid sheets or other records of the contractor.

If the sale price cannot be established in the above manner and the fixture is manufactured by the contractor, the cost price shall be deemed to be the aggregate of the following:

- [1] Cost of materials, including such items as freight-in and import duties,
- [2] Direct labor, including fringe benefits and payroll taxes,
- [3] Specific factory costs attributable to the fixture,
- [4] Any manufacturer's excise tax,
- [5] Pro rata share of all overhead attributable to the manufacture of the fixture, and
- [6] Reasonable profit from the manufacturing operation which, in the absence of evidence to the contrary, shall be deemed to be 5 percent of the sum of the preceding factors.

Jobsite fabrication labor and its prorated share of manufacturing overhead must be included in the sale price of the fixture. Jobsite fabrication labor includes assembly labor performed prior to attachment of a component or a fixture to a structure or other real property.

3. Exceptions-Leased Fixtures. In some instances the construction contractor may furnish and install a fixture for a person, other than the owner of the realty, who intends to lease the fixture in place as tangible personal property as provided in section 6016.3 of the Revenue and Taxation Code and pay tax measured by rental receipts.

In this case the construction contractor may take a resale certificate from the lessor at the time of the transaction and the sale to the lessor will be considered to be a sale for resale. The resale certificate should indicate that the fixture is purchased for resale by the purchaser as tangible personal property under section 6016.3 of the Revenue and Taxation Code.

(C) Machinery and Equipment.

1. In General. Construction contractors are retailers of machinery and equipment even though the machinery and equipment is furnished in connection with a construction contract. Tax applies to the contractor's gross receipts from such sales.

2. Measure of Tax.

a. In General. Tax applies to the gross receipts from the sale of machinery and equipment furnished and installed by a construction contractor. If the contract calls only for the furnishing and installation of machinery and equipment, tax applies to the total contract price less those charges excludible from gross receipts under Section 6012 of the Revenue and Taxation Code.

b. Lump Sum Contracts-Determining Gross Receipts. If the contract is for a lump sum and includes the furnishing and installation of materials, fixtures, and machinery and equipment, the gross receipts from the sale of the machinery and equipment shall be the price at which

similar quantities ready for installation are sold at retail delivered in the market area where the installation takes place.

If there is no such retail price for the machinery and equipment, then the gross receipts shall be determined from the contracts, price lists, bid sheets, or other records of the contractor.

If the gross receipts cannot be established in the above manner and the machinery and equipment is manufactured by the contractor, the gross receipts from the sale shall be the aggregate of the following:

- [1] Cost of materials, including such items as freight-in and import duties,
- [2] Direct labor, including fringe benefits and payroll taxes,
- [3] Specific factory costs attributable to the machinery or equipment,
- [4] Any manufacturer's excise tax,
- [5] Pro rata share of all overhead attributable to the machinery or equipment, including overhead attributable to manufacturing, selling, contracting, and administration, and
- [6] Reasonable profit from the manufacture and sale of the machinery or equipment which, in the absence of evidence to the contrary, shall be deemed to be 5 percent of the sum of the preceding factors.

Jobsite fabrication labor and its prorated share of manufacturing overhead must be included in the sale price of the machinery or equipment. Jobsite fabrication labor includes assembly labor performed prior to attachment of a component or the machinery or equipment to a structure or other real property.

(D) Cost Plus A Fee Contracts. When a contractor enters into a construction contract for a cost plus a fee or time and materials plus a fee, whether the fee is a lump sum or a percentage of costs, the fee is not included in the measure of tax. When the contractor is the manufacturer of the fixtures or machinery and equipment, the "cost price" of the fixtures and the gross receipts from the sale of the machinery and equipment shall be determined in accordance with (B) and (C) above.

(3) Miscellaneous Sales by Contractors. In addition to sales of fixtures and machinery and equipment, tax applies to all retail sales by contractors of tangible personal property, including parts, supplies, tools, construction equipment, buildings severed or to be severed by the contractor, and furniture, including furniture sold with a building, even though the building is sold "in place."

(4) Permits. Contractors engaged solely in performing construction contracts which do not involve the sale and installation of fixtures and who do not also engage in business as sellers or retailers are not required to hold seller's permits. However, if a contractor is a seller or retailer because he or she makes sales of fixtures, materials, or machinery and equipment, or other tangible personal property either in connection with or as part of a construction contract, or otherwise, he or she is required to hold a seller's permit.

(5) Supplies and Tools for Self-Use. Contractors are the consumers of supplies such as oxygen, acetylene, gasoline, acid, thread-cutting oil, and tools and parts for tools, which they use in their business, and the tax applies to the sale of such supplies and tools to contractors.

(6) Exemption Certificates.

(A) Resale Certificates. Contractors holding valid seller's permits may purchase fixtures and machinery and equipment for resale by issuing resale certificates to their suppliers. They may not purchase materials for resale unless they are also in the business of selling materials.

A contractor cannot avoid liability for sales or use tax on materials or fixtures furnished and installed by him or her by taking a resale certificate from the prime contractor, interior decorators, designers, department stores, or others. However, under the circumstances described in subsection (b) (2) (B)3., a contractor may take a resale certificate for fixtures furnished and installed by him or her for a person other than the owner of the realty.

(B) Exemption Certificates for Out-of-State Use. Sales tax does not apply to sales of tangible personal property to a construction contractor who holds a valid California seller's permit when the property is used by the contractor outside this state in his or her performance of a contract to improve real property and as a result of such use the property is incorporated into and becomes a part of real property located outside this state. This exemption is available only if at the time of the purchase the contractor certifies in writing to the seller that he or she holds a valid California seller's permit (giving the number of that permit and identifying the property purchased) and states that the property will be used in the manner stated above. The certificate must be signed by the contractor or an authorized employee. Such a certification may appear in the body of a purchase order which bears the signature of the purchaser. Any certificate given subsequent to the time of purchase will not be recognized.

If the property purchased under a certificate is used by the contractor in any other manner or for any other purpose than stated in the certificate, the contractor shall be liable for sales tax as if he or she were a retailer making a retail sale of the property at the time of such use, and the sale price of the property to him or her shall be deemed the gross receipts from the sale.

(C) Deductions for Tax-Paid Purchases Resold. A contractor may claim a "tax-paid purchases resold" deduction for any property of which he or she is the retailer when he or she has reimbursed his or her vendor for tax which the vendor is required to pay to the State or has paid the use tax with respect to the property, and has resold the property prior to making any use of it. In the event that the contractor sells short ends or pieces which are not used other than in severing them from larger units purchased by him or her and as to which he or she has paid sales tax reimbursement or use tax, he or she may claim the deduction for tax-paid purchases resold, but the amount of the deduction shall not exceed the price at which he or she sells such short ends or pieces.

(c) Particular Applications.

(1) Draperies and Drapery Hardware. Persons who contract to sell and install draperies including drapery hardware, such as brackets, rods, tracks, etc., are retailers of the items which they furnish and install. Tax applies to the entire contract price exclusive of the charge for installation which charge should be separately stated. Installers who furnish drapery hardware or other tangible personal property may accept resale certificates from department stores or other sellers to furnish and install the draperies and drapery hardware.

The department stores or other sellers furnishing resale certificates are required to pay the tax to the state upon their selling price of the draperies and drapery hardware, exclusive of installation charges. The installer should segregate his or her installation charge in order that the department store or other seller may properly segregate its charge attributable to installation for purposes of determining its taxable gross receipts.

(2) Prefabricated Cabinets. A cabinet will be considered to be "prefabricated" and a "fixture" when 90 percent of the total direct cost of labor and material in fabricating and installing the

cabinet is incurred prior to affixation to the realty. In determining this 90 percent, the total direct cost of all labor and materials in fabricating the cabinet to the point of installation will be compared to the total direct cost of all labor and materials in completely fabricating and installing the cabinet. If more than one cabinet is fabricated and installed under the contract, each cabinet will be considered separately in determining whether the cabinet is prefabricated.

(3) Prefabricated Buildings. Prefabricated units such as commercial coaches, house trailers, etc., registered with the Department of Motor Vehicles or the Department of Housing and Community Development, are tangible personal property even though they may be connected to plumbing and utilities. A mobilehome which meets or is modified to meet, all applicable building codes and regulations and which is permanently affixed to realty, is an improvement to realty and is not personal property.

A contract to furnish and install a prefabricated or modular building which is not a factory-built school building (relocatable classroom) is a construction contract whether the building rests in place by its own weight or is physically attached to realty. It is immaterial whether the building is erected upon or affixed to land owned by the owner of the building or is leased to the landowner or lessee of the land.

Generally, a contract to furnish and install a small prefabricated building, such as a shed or kiosk, which is movable as a unit from its site of installation, is a construction contract only if the building is required to be physically attached to real property by the seller, upon a concrete foundation or otherwise. The sale of such a unit to rest in place by its own weight, whether upon the ground, a concrete slab, or sills or piers, is not a construction contract even though the seller may deliver the unit to its site of use.

Prefabricated or modular buildings which are "factory-built housing" where permanently affixed to the realty are improvements to realty. The manufacturer of factory-built housing who contracts to furnish and install the factory-built housing manufactured by him or her is the consumer of the materials used in building and installing the factory-built housing and the retailer of the fixtures. Tax applies as provided in (b) above.

(4) Factory-built School Buildings.

(A) General. On and after September 26, 1989, a contract to furnish and install a factory-built school building is not a construction contract but rather is a sale of tangible personal property.

(B) Definitions.

1. "Factory-built School Building." The term "factory-built school building" (relocatable classroom) means and includes:

A. for the period September 26, 1989 through September 12, 1990, any building designed to be used as a school building as defined in sections 39214 and 81165 of the Education Code and so used. A factory-built school building must be designed in compliance with state laws for school construction and approved by the structural safety section in the office of the State Architect. It must be wholly or substantially manufactured at an offsite location for the purpose of being assembled, erected, or installed on a school site.

B. effective September 13, 1990, any building which is designed or intended for use as a school building and is wholly or substantially manufactured at an offsite location for the purpose of being assembled, erected, or installed on a site owned or leased by a school district or a community college district. A factory-built school building must be designed and manufactured in accordance with building standards adapted and approved pursuant to

chapter 4 (commencing with section 18935) of part 2.5 of division 13 of the Health and Safety Code and must be approved by the structural safety section in the office of the State Architect.

The term does not include buildings licensed by either the Department of Motor Vehicles or the Department of Housing and Community Development. The term also does not include prefabricated or modular buildings which are similar in size to, but which are not, "factory-built school buildings". It is immaterial whether the building is erected upon or affixed to land owned by the owner of the building or is leased to the landowner or lessee of the land.

2. "Consumer."

A. For the period September 26, 1989 through September 12, 1990, the term "consumer" as used herein means either

(1) a school or a school district or

(2) a contractor who purchases a factory-built school building for the purpose of fulfilling the requirements of an existing contract with a school or school district to furnish and install such building.

B. Effective September 13, 1990, the term "consumer" as used herein means either

(1) a school district or a community college district or

(2) a contractor who purchases a factory-built school building for the purpose of fulfilling the requirements of an existing contract with a school district or a community college district to furnish and install such building.

(C) Place of Sale. The place of sale or purchase of a factory built school building is the place of business of the retailer regardless of whether the sale of the building includes installation or whether the building is placed upon a permanent foundation.

(D) Application of Tax.

1. Tax applies to 40 percent of the sales price of the building to the consumer excluding any charges for placing the completed building on the site. The sales price of the building shall include amounts representing tangible personal property installed in the building by a subcontractor, whether prior to or after installation of the building at the site, provided such installation is called for in the prime contract for the building.

A separate contract to furnish and install tangible personal property in a factory-built school building after installation of the building at the site is a construction contract and the tax applies as in (b) above. Any contract or subcontract for site preparation (e.g., foundation) is a construction contract and tax applies as in (b) above.

2. The sale of a factory-built school building to a purchaser who will resell the building without installation is a sale for resale and the seller may accept a resale certificate from the purchaser. If the purchaser then sells to a contractor who has an existing contract to install the building on a school site, tax will apply as in (c)(4)(D)1 above. If tax has been paid on the purchase price of a factory-built school building which is subsequently resold for installation, a tax-paid purchases resold deduction may be taken as provided in Regulation 1701 (18 CCR 1701).

E. Exclusion Certificate. For the period September 26, 1989, through September 12, 1990, if the purchaser certifies in writing to the retailer that the factory built school building

purchased will be consumed in a manner or for a purpose entitling the retailer to exclude 60% of the gross receipts or sales price from the measure of tax and uses the property in some other manner or for some other purpose, the purchaser shall be liable for payment of tax measured by 60% of the sales price. For the above stated period, all retailers who make retail sales of "factory-built school buildings" claimed to be subject to tax measured by 40 percent of the sales price must obtain from the "consumer" a signed certificate substantially in the form set forth below.

CLAIM FOR 60% EXCLUSION FROM TAX ON
PURCHASE OF FACTORY-BUILT SCHOOL BUILDINGS
(Sec. 6012.6. Rev. & Tax. Code)

I hereby certify that the factory-built school building that I

...

(Name of Purchaser-Consumer)

am purchasing under the authority of this certificate from

...

(Name of Retailer)

will be used as a school building as defined in Sales and Use Tax Regulation 1521. My seller's permit number, if any, is

I further certify that I understand and agree that if the property purchased under the authority of this certificate is used by the purchaser for any purpose other than indicated above, the purchaser shall be liable for payment of tax to the State Board of Equalization at the time of such use measured by 60% of the sales price of the factory-built school building.

Signed by ...

(Name of Purchaser)

As: ...

(Owner, Partner, Purchasing Agent, etc.)

Date ...

(5) Mobilehomes Installed for Occupancy as Residences.

Operative July 1, 1980, a special measure of sales or use tax is provided for a mobilehome sold to be affixed to realty for occupancy as a residence.

A mobilehome dealer who sells a new mobilehome to a construction contractor to be affixed to land for occupancy as a residence is the "retailer-consumer" of the property and is required to pay tax for the period in which the sale was made by the dealer measured by an amount equal to 75 percent of the retailer-consumer's purchase price of the mobilehome.

A construction contractor who withdraws a new mobilehome from an inventory purchased for resale to be affixed to realty for occupancy as a residence in the performance of a construction contract is required to pay tax measured by 75 percent of the purchase price by his or her mobilehome vendor except where the purchase is made directly from a mobilehome manufacturer. In the absence of satisfactory evidence of the vendor's purchase price it shall be presumed that the measure of tax for the transaction is an amount equivalent to 60 percent of the sales price of the mobilehome to the construction contractor.

A mobilehome manufacturer who sells a new mobilehome directly to a construction contractor for installation to real property for occupancy as a residence is required to pay tax measured by 75 percent of the sales price at which a similar mobilehome ready for installation would be sold by the manufacturer to a retailer-consumer in this state. A construction contractor who withdraws a new mobilehome from an inventory purchased from a manufacturer for resale must pay tax measured by 75 percent of his or her purchase price.

A mobilehome manufacturer who performs a construction contract by permanently affixing a new mobilehome to real property is the consumer of the material and the retailer of fixtures installed by him or her and the tax applies as set forth in paragraph (b) above.

Reference should also be made to the provisions of Regulation 1610.2 for additional interpretative rules relating to custom additions to the mobilehome prior to sale, transfers of nonvehicle items, and the application of the tax to a purchase made from an out-of-state retailer.

(6) Repair Contracts. A contract to repair a fixture in place or a fixture the contractor is required by the contract to reattach to the realty is a construction contract. Sales or use tax applies to the gross receipts or sales price of the parts sold by a contractor who is a retailer under this provision. Either sales tax or use tax applies to the sales price of the parts sold to or used by a contractor who is a consumer under this provision.

(A) United States Construction Contractors. A United States construction contractor is the consumer of the parts furnished in the performance of a construction contract to repair a fixture.

(B) Construction Contractors Other Than United States Construction Contractors.

1. A contractor is the retailer of the parts furnished in the performance of a construction contract to repair a fixture when the sale price of the parts is billed separately from the repair labor.

2. A contractor is the consumer of the parts furnished in the performance of a lump sum construction contract to repair a fixture.

(7) Elevator Installations. A large number of components are included in the installation of an elevator system. Those portions constituting the cage or platform and its hoisting machinery are fixtures. The balance of the installation, if attached to a structure or other real property will generally be "materials."

Similarly, installation of escalators and moving sidewalks are in part fixtures and in part materials.

Following are examples of components constituting part of the cage or platform and its hoisting machinery, and which are fixtures:

- alarm bell
- cab or car
- car doors
- car platform and sling
- door hanger on cab
- door openers
- door operator on cab or car
- door safety edge on cab
- door sills on cab
- electronic door protector
- jack assembly
- motors
- power units and control boxes
- pumps
- pushbuttons on cab
- wire and piping (which are components of a fixture)

Following are examples of components constituting "materials" when attached to realty:

- car guides
- casing section of jack assembly
- guide rails
- hoistway doors
- hoistway door frames
- hoistway door safety edge
- hoistway door sills and jambs
- hoistway door supports
- hoistway entrance
- pushbuttons on hoistway
- rail brackets
- sill, struts
- sound insulating panels on "materials"
- structural steel (unless part of cab, car, or other "fixture")
- valve strainer
- wire and piping attached to "materials"

Following are examples of components constituting parts of escalators or moving sidewalks which are fixtures:

- staircase
- moving sidewalk
- moving handrails
- chains
- sprockets
- motors
- other operating mechanisms

(8) Telephone Switchboards and Instruments. Telephone switching equipment installed in a building specifically designed to accommodate the equipment or attached to a building or structure in a manner such that its removal would cause damage to the equipment or building in which it is installed will be considered to be "fixtures" under paragraph (a)(5) of this regulation.

Telephone handsets, modular switching equipment and standardized, off-shelf, general purpose switching equipment sold for use in general purpose office buildings constitute machinery and equipment under paragraph (a)(6) of this regulation. Handsets, modular switching equipment and standardized equipment were previously classified as fixtures.

This change in classification shall be applied prospectively only with respect to construction contracts entered into on and after July 1, 1988, by contractors other than United States

construction contractors.

(9) Deep-Well Agricultural Pumps. A deep-well agricultural pump is tangible personal property if installed so that it rests in position by force of gravity and is not otherwise affixed to the land.

The pump is a fixture if:

(A) It is affixed to the land such as by concrete, bolts or screws,

(B) It is physically connected to an irrigation system such as by pipes or couplings so as to become an integral part of the system, or

(C) It is enclosed by a pump house or other building or structure.

(10) Remote Control Garage Door Openers. Remote control garage door opening units are fixtures. Portable transmitter units furnished pursuant to a construction contract are deemed to be fixtures and are taxable as provided in subdivision (b)(2)(B). Sales of portable transmitter units not a part of a construction contract, as, for example, sales of replacement units, are retail sales of tangible personal property and subject to tax as such.

(11) Excess Reimbursement.

The excess tax reimbursement provisions of Regulation 1700 apply to construction contractors.

(12) On-Premise Electric Signs

(A) An on-premise electric sign is an electrically powered or illuminated structure, housing, sign, device, figure, statuary, painting, display, message, placard, or other contrivance or any part thereof affixed to real property and intended or used to advertise, or to provide data or information in the nature of advertising, for any of the following purposes: 1) To designate, identify, or indicate the name or business of the owner or occupant of the premises upon which the advertising display is located, or 2) To advertise the business conducted, services available or rendered, or the goods produced, sold, or available for sale, upon the property where the advertising display has been erected.

(B) Application of tax. An on-premise electric sign is a fixture and tax applies to the sale price of the sign. Notwithstanding the provisions of 1521(b)(2)(B), operative October 1, 2000, if the contract does not state the sale price of the sign, tax applies to 33 percent of the contract price of on-premise electric signs that are furnished and installed by the seller. "Contract price" includes charges for materials, fabrication labor, installation labor, overhead, profit, and other charges associated with the sale and installation of the sign. If a contract provides that a contractor is to install an on-premise electric sign furnished by a third party, the charges for installation are not taxable. If a seller furnishes but does not install an on-premise electric sign, the seller is a retailer of the sign and tax applies to the total contract price.

Separately stated charges for transportation are subject to tax as defined in Regulation 1628, Transportation Charges.

Appendix A

The following is a list of typical items regarded as materials:

Asphalt

Bricks

Builders' hardware

Caulking material

Cement

Conduit

Doors

Ducts

Electric wiring and connections

Flooring

Glass

Gravel

Insulation

Lath

Lead

Lime

Linoleum

Lumber

Macadam

Millwork

Mortar

Oil

Paint

Paper

Piping, valves, and pipe fittings

Plaster

Power poles, towers, and lines

Putty

Reinforcing mesh

Roofing

Sand

Sheet metal

Steel

Stone

Stucco

Tile

Wall coping

Wallboard

Wallpaper

Wall-to-wall carpeting (when affixed to the floor)

Weather stripping

Windows

Window screens

Wire netting and screen

Wood preserver

Appendix B

The following is a list of typical items regarded as fixtures:

Air conditioning units

Awnings

Burglar alarm and fire alarm fixtures

Cabinets, counters, and lockers (prefabricated)

Cranes¹

[See Illustration In Original]

(including moving parts of cranes) affixed or annexed to a building, structure or fixed work

Electric generators (affixed to and accessory to a building, structure or fixed works)

Elevators, hoists, and conveying units

Furnaces, boilers, and heating units

Lighting fixtures

Plumbing fixtures

Refrigeration units

Signs

Television antennas

Transformers and switchgear

Vault doors and equipment

Venetian blinds

Appendix C

The following are lists of typical items regarded as:

Machinery and Equipment

Drill presses

Electric generators (unaffixed, or, if affixed, which meet the requirements of subparagraph (a)(6))

Lathes

Machine tools

Printing presses

Not Machinery or Equipment

Fixtures and materials as defined in this regulation

Wiring, piping, etc., used as a source of power, water, etc., for machinery and equipment

Radio transmission antennas

Large tanks (i.e., over 500 barrel capacity)

Fire alarm systems

Street light standards

Cooling towers other than small prefabricated cooling units

AUTHORITY:

Note: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Sections 6006-6010, 6012, 6012.2, 6012.6, 6012.8, 6012.9, 6015, 6016, 6016.3, 6016.5, 6055, 6091-6095, 6203.5, 6241-6246, 6276, 6276.1, 6379, 6384, 6386, 6421 and 6901.5, Revenue and Taxation Code.

HISTORY:

1. Renumbering from former section 1921 and amendment of subsections (f) and (g) filed 11-3-71; effective thirtieth day thereafter (Register 71, No. 45). For prior history see Register 65, No. 23.
2. Amendment; of subsection (g) filed 11-12-71; effective thirtieth day thereafter (Register 71, No. 46).
3. Amendment filed 2-25-76; designated effective 4-1-76 (Register 76, No. 9).
4. Amendment filed 8-20-76; effective thirtieth day thereafter (Register 76, No. 34).
5. Amendment of subsections (a)(3), (b)(1)(A), (b)(1)(B), (b)(6)(C), (c)(7) and (d) filed 1-19-79; effective thirtieth day thereafter. Pursuant to Chapter 1211, Statutes of 1978, the order designates an operative date of 1-1-79 (Register 79, No. 3).
6. Amendment of subsection (c) filed 8-22-80 as an emergency; effective upon filing (Register 80, No. 34). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 12-22-80.
7. Certificate of Compliance including amendment of subsection (b) transmitted to OAL 12-19-80 and filed 1-16-81 (Register 81, No. 3).
8. Amendment of subsections (c)(3), (8) and (9) filed 3-15-84; effective thirtieth day thereafter (Register 84, No. 11).
9. Amendment of subsections (c)(4) and Appendices B and C filed 4-11-86; effective thirtieth day thereafter (Register 86, No. 15).
10. Amendment of subsections (b)(1)(A), (c)(4), (c)(7)-(10) and Appendices B and C filed 6-2-88; operative 7-2-88 (Register 88, No. 24).
11. Amendment of subsections (a), (c)(3) and Appendix C filed 5-18-89; operative 6-17-89 (Register 89, No. 20).
12. Amendment of subsection (c) filed 7-19-91; operative 8-17-91 (Register 91, No. 49).
13. Amendment filed 6-16-95; operative 7-17-95 (Register 95, No. 24).
14. Amendment of subsection (a)(2) filed 1-14-99; operative 2-13-99 (Register 99, No. 3).
15. New subsections (c)(12)-(c)(12)(B) filed 5-18-2000; operative 6-17-2000 (Register 2000, No. 20).

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Regulation 1521. CONSTRUCTION CONTRACTORS.

Reference: Revenue and Taxation Code sections 6006–6010, 6012, 6012.2, 6012.6, 6012.8, 6012.9, 6015, 6016, 6016.3, 6016.5, 6055, 6091–6095, 6203.5, 6241–6246, 6276, 6276.1, 6379, 6384, 6386, 6421, and 6901.5.

(a) DEFINITIONS.

(1) CONSTRUCTION CONTRACT.

(A) “Construction contract” means and includes a contract, whether on a lump sum, time and material, cost plus, or other basis, to:

1. Erect, construct, alter, or repair any building or other structure, project, development, or other improvement on or to real property, or
2. Erect, construct, alter, or repair any fixed works such as waterways and hydroelectric plants, steam and atomic electric generating plants, electrical transmission and distribution lines, telephone and telegraph lines, railroads, highways, airports, sewers and sewage disposal plants and systems, waterworks and water distribution systems, gas transmission and distribution systems, pipelines and other systems for the transmission of petroleum and other liquid or gaseous substances, refineries and chemical plants, or
3. Pave surfaces separately or in connection with any of the above works or projects, or
4. Furnish and install the property becoming a part of a central heating, air-conditioning, or electrical system of a building or other structure, and furnish and install wires, ducts, pipes, vents, and other conduit imbedded in or securely affixed to the land or a structure thereon.

(B) “Construction contract” does not include:

1. A contract for the sale or for the sale and installation of tangible personal property such as machinery and equipment, or
2. The furnishing of tangible personal property under what is otherwise a construction contract if the person furnishing the property is not responsible under the construction contract for the final affixation or installation of the property furnished.

(2) CONSTRUCTION CONTRACTOR. “Construction contractor” means any person who for himself or herself, in conjunction with, or by or through others, agrees to perform and does perform a construction contract. “Construction contractor” includes subcontractors and specialty contractors and those engaged in such building trades as carpentry, bricklaying, cement work, steel work, plastering, drywall installation, sheet metal work, roofing, tile and terrazzo work, electrical work, plumbing, heating, air-conditioning, elevator installation and construction, painting, and persons installing floor coverings, including linoleum, floor tile, and wall-to-wall carpeting, by permanently affixing such coverings to a floor. “Construction contractor” includes any person required to be licensed under the California Contractors’ State License Law (Business & Professions Code Sections 7000 et seq.), and any person contracting with the United

Attachment to May 5, 2006, Memorandum Regarding
Petition of California Solar Energy Industries Association

States to perform a construction contract, whether such persons are formed or organized under the laws of this state, or another state or country.

(3) UNITED STATES CONSTRUCTION CONTRACTOR. “United States construction contractor” means a construction contractor who for himself or herself, in conjunction with, or by or through others, agrees to perform and does perform a construction contract for the United States Government.

(4) MATERIALS. “Materials” means and includes construction materials and components, and other tangible personal property incorporated into, attached to, or affixed to, real property by contractors in the performance of a construction contract and which, when combined with other tangible personal property, loses its identity to become an integral and inseparable part of the real property. A list of typical items regarded as materials is set forth in Appendix A.

Solar panels and photovoltaic cells are considered materials when furnished and installed in the performance of a construction contract and are incorporated, attached or otherwise affixed to realty. Solar panels and photovoltaic cells when part of a solar energy system are considered to be architecturally or functionally integrated into the realty. Solar panels and photovoltaic cells that are held in place by their own size, weight and mass, are deemed to be affixed to the realty when it is the intent of the parties that the solar panels are a permanent addition to the realty. A solar energy system is defined as any solar collector or other solar energy device that provides for the collection and distribution, and where applicable the storage of solar energy.

(5) FIXTURES. “Fixtures” means and includes items which are accessory to a building or other structure and do not lose their identity as accessories when installed. A list of typical items regarded as fixtures is set forth in Appendix B.

(6) MACHINERY AND EQUIPMENT. “Machinery and equipment” means and includes property intended to be used in the production, manufacturing or processing of tangible personal property, the performance of services or for other purposes (e.g., research, testing, experimentation) not essential to the fixed works, building, or structure itself, but which property incidentally may, on account of its nature, be attached to the realty without losing its identity as a particular piece of machinery or equipment and, if attached, is readily removable without damage to the unit or to the realty. “Machinery and equipment” does not include junction boxes, switches, conduit and wiring, or valves, pipes, and tubing incorporated into fixed works, buildings, or other structures, whether or not such items are used solely or partially in connection with the operation of machinery and equipment, nor does it include items of tangible personal property such as power shovels, cranes, trucks, and hand or power tools used to perform the construction contract. A list of typical items regarded as machinery and equipment together with a list of typical items not regarded as machinery and equipment is set forth in Appendix C.

(7) TIME AND MATERIAL CONTRACT. “Time and material contract” means a contract under which the contractor agrees to furnish and install materials or fixtures, or both, and which sets forth separately a charge for the materials or fixtures and a charge for their installation or fabrication.

(8) LUMP SUM CONTRACT. "Lump sum contract" means a contract under which the contractor for a stated lump sum agrees to furnish and install materials or fixtures, or both. A lump sum contract does not become a time and material contract when the amounts attributable to materials, fixtures, labor, or tax are separately stated in the invoice.

(b) APPLICATION OF TAX.

(1) UNITED STATES CONSTRUCTION CONTRACTORS.

(A) Materials and Fixtures. United States construction contractors are consumers of materials and fixtures which they furnish and install in the performance of contracts with the United States Government. Either the sales tax or the use tax applies with respect to sales of tangible personal property (including materials, fixtures, supplies, and equipment) to contractors for use in the performance of such contracts with the United States for the construction of improvements on or to real property in this state. The fact that the contract may provide principally for the manufacture or acquisition of tangible personal property is immaterial. The sales tax, but not the use tax, applies even though the contractor purchases the property as the agent of the United States.

(B) Machinery and Equipment. United States contractors are retailers of machinery and equipment furnished in connection with the performance of a construction contract with the United States Government. Tax does not apply to sales of machinery and equipment to United States contractors or subcontractors, provided title to the property passes to the United States before the contractor makes any use of it. Such sales are sales for resale, and the purchasing contractor may issue a resale certificate. A contractor who uses the machinery or equipment before title passes to the United States is the consumer of that machinery or equipment and either sales tax or use tax applies with respect to the sale to or the use by the contractor.

(2) CONSTRUCTION CONTRACTORS OTHER THAN UNITED STATES CONSTRUCTION CONTRACTORS.

(A) Materials.

1. In General. Construction contractors are consumers of materials which they furnish and install in the performance of construction contracts. Either sales tax or use tax applies with respect to the sale of the materials to or the use of the materials by the construction contractor.

2. When Contractor is Seller. A construction contractor may contract to sell materials and also to install the materials sold. If the contract explicitly provides for the transfer of title to the materials prior to the time the materials are installed, and separately states the sale price of the materials, exclusive of the charge for installation, the contractor will be deemed to be the retailer of the materials.

In the case of a time and material contract, if the contractor bills his or her customer an amount for "sales tax" computed upon his or her marked up billing for materials, it will be assumed, in the absence of convincing evidence to the contrary, that he or she is the retailer of the materials.

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If the sale occurs in this state, the sales tax applies to the contractor's (retailer's) gross receipts from the sale of the materials. If the sale occurs prior to the time the property is brought into this state, the contractor's (retailer's) customer is the consumer and his or her use (unless otherwise exempt) is subject to use tax measured by the sales price. The contractor must collect the use tax and pay it to this state.

(B) Fixtures.

1. In General. Construction contractors are retailers of fixtures which they furnish and install in the performance of construction contracts and tax applies to their sales of the fixtures.

2. Measure of Tax.

a. In General. If the contract states the sale price at which the fixture is sold, tax applies to that price. If the contract does not state the sale price of the fixture, the sale price shall be deemed to be the cost price of the fixture to the contractor.

b. Determining Cost Price. If the contractor purchases the fixtures in a completed condition, the cost price is deemed to be the sale price of the fixture to him or her and shall include any manufacturer's excise tax or import duty imposed with respect to the fixture prior to its sale by the contractor.

If the contractor is the manufacturer of the fixture, the cost price is deemed to be the price at which similar fixtures in similar quantities ready for installation are sold by him or her to other contractors.

If similar fixtures are not sold to other contractors ready for installation, then the cost price shall be deemed to be the amount stated in the price lists, bid sheets or other records of the contractor.

If the sale price cannot be established in the above manner and the fixture is manufactured by the contractor, the cost price shall be deemed to be the aggregate of the following:

- [1] Cost of materials, including such items as freight-in and import duties,
- [2] Direct labor, including fringe benefits and payroll taxes,
- [3] Specific factory costs attributable to the fixture,
- [4] Any manufacturer's excise tax,
- [5] Pro rata share of all overhead attributable to the manufacture of the fixture, and
- [6] Reasonable profit from the manufacturing operations which, in the absence of evidence to the contrary, shall be deemed to be 5 percent of the sum of the preceding factors.

Jobsite fabrication labor and its prorated share of manufacturing overhead must be included in the sale price of the fixture. Jobsite fabrication labor includes assembly labor performed prior to attachment of a component or a fixture to a structure or other real property.

3. Exceptions—Leased Fixtures. In some instances the construction contractor may furnish and install a fixture for a person, other than the owner of the realty, who intends to lease the fixture in place as tangible personal property as provided in Section 6016.3 of the Revenue and Taxation Code and pay tax measured by rental receipts.

In this case the construction contractor may take a resale certificate from the lessor at the time of the transaction and the sale to the lessor will be considered to be a sale for resale. The resale certificate should indicate that the fixture is purchased for resale by the purchaser as tangible personal property under Section 6016.3 of the Revenue and Taxation Code.

(C) Machinery and Equipment.

1. In General. Construction contractors are retailers of machinery and equipment even though the machinery and equipment is furnished in connection with a construction contract. Tax applies to the contractor's gross receipts from such sales.

2. Measure of Tax.

a. In General. Tax applies to the gross receipts from the sale of machinery and equipment furnished and installed by a construction contractor. If the contract calls only for the furnishing and installation of machinery and equipment, tax applies to the total contract price less those charges excludable from gross receipts under Section 6012 of the Revenue and Taxation Code.

b. Lump Sum Contracts—Determining Gross Receipts. If the contract is for a lump sum and includes the furnishing and installation of materials, fixtures, and machinery and equipment, the gross receipts from the sale of the machinery and equipment shall be the price at which similar quantities ready for installation are sold at retail delivered in the market area where the installation takes place.

If there is no such retail price for the machinery and equipment, then the gross receipts shall be determined from the contracts, price lists, bid sheets, or other records of the contractor.

If the gross receipts cannot be established in the above manner and the machinery and equipment is manufactured by the contractor, the gross receipts from the sale shall be the aggregate of the following:

- [1] Cost of materials, including such items as freight-in and import duties,
- [2] Direct labor, including fringe benefits and payroll taxes,
- [3] Specific factory costs attributable to the machinery or equipment,
- [4] Any manufacturer's excise tax,
- [5] Prorata share of all overhead attributable to the machinery or equipment, including overhead attributable to manufacturing, selling, contracting, and administration, and
- [6] Reasonable profit from the manufacture and sale of the machinery or equipment which, in the absence of evidence to the contrary, shall be deemed to be 5 percent of the sum of the preceding factors.

Jobsite fabrication labor and its prorated share of manufacturing overhead must be included in the sale price of the machinery or equipment. Jobsite fabrication labor includes assembly labor performed prior to attachment of a component or the machinery or equipment to a structure or other real property.

(D) Cost Plus A Fee Contracts. When a contractor enters into a construction contract for a cost plus a fee or time and materials plus a fee, whether the fee is a lump sum or a percentage of costs, the fee is not included in the measure of tax. When the

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contractor is the manufacturer of the fixtures or machinery and equipment, the “cost price” of the fixtures and the gross receipts from the sale of the machinery and equipment shall be determined in accordance with (B) and (C) above.

(3) MISCELLANEOUS SALES BY CONTRACTORS. In addition to sales of fixtures and machinery and equipment, tax applies to all retail sales by contractors of tangible personal property, including parts, supplies, tools, construction equipment, buildings severed or to be severed by the contractor, and furniture, including furniture sold with a building, even though the building is sold “in place.”

(4) PERMITS. Contractors engaged solely in performing construction contracts which do not involve the sale and installation of fixtures and who do not also engage in business as sellers or retailers are not required to hold seller’s permits. However, if a contractor is a seller or retailer because he or she makes sales of fixtures, materials, or machinery and equipment, or other tangible personal property either in connection with or as part of a construction contract, or otherwise, he or she is required to hold a seller’s permit.

(5) SUPPLIES AND TOOLS FOR SELF-USE. Contractors are the consumers of supplies such as oxygen, acetylene, gasoline, acid, thread-cutting oil, and tools and parts for tools, which they use in their business, and the tax applies to the sale of such supplies and tools to contractors.

(6) EXEMPTION CERTIFICATES.

(A) Resale Certificates. Contractors holding valid seller’s permits may purchase fixtures and machinery and equipment for resale by issuing resale certificates to their suppliers. They may not purchase materials for resale unless they are also in the business of selling materials.

A contractor cannot avoid liability for sales or use tax on materials or fixtures furnished and installed by him or her by taking a resale certificate from the prime contractor, interior decorators, designers, department stores, or others. However, under the circumstances described in subsection (b)(2)(B)3., a contractor may take a resale certificate for fixtures furnished and installed by him or her for a person other than the owner of the realty.

(B) Exemption Certificates for Out-of-State Use. Sales tax does not apply to sales of tangible personal property to a construction contractor who holds a valid California seller’s permit when the property is used by the contractor outside this state in his or her performance of a contract to improve real property and as a result of such use the property is incorporated into and becomes a part of real property located outside this state. This exemption is available only if at the time of the purchase the contractor certifies in writing to the seller that he or she holds a valid California seller’s permit (giving the number of that permit and identifying the property purchased) and states that the property will be used in the manner stated above. The certificate must be signed by the contractor or an authorized employee.

Such a certification may appear in the body of a purchase order which bears the signature of the purchaser. Any certificate given subsequent to the time of purchase will not be recognized.

If the property purchased under a certificate is used by the contractor in any other manner or for any other purpose than stated in the certificate, the contractor shall be liable for sales tax as if he or she were a retailer making a retail sale of the property at the time of such use, and the sale price of the property to him or her shall be deemed the gross receipts from the sale.

(C) Deductions for Tax-Paid Purchases Resold. A contractor may claim a “tax-paid purchases resold” deduction for any property of which he or she is the retailer when he or she has reimbursed his or her vendor for tax which the vendor is required to pay to the State or has paid the use tax with respect to the property, and has resold the property prior to making any use of it. In the event that the contractor sells short ends or pieces which are not used other than in severing them from larger units purchased by him or her and as to which he or she has paid sales tax reimbursement or use tax, he or she may claim the deduction for tax-paid purchases resold, but the amount of the deduction shall not exceed the price at which he or she sells such short ends or pieces.

(c) PARTICULAR APPLICATIONS.

(1) **DRAPERIES AND DRAPERY HARDWARE.** Persons who contract to sell and install draperies including drapery hardware, such as brackets, rods, tracks, etc., are retailers of the items which they furnish and install.

Tax applies to the entire contract price exclusive of the charge for installation which charge should be separately stated. Installers who furnish drapery hardware or other tangible personal property may accept resale certificates from department stores or other sellers to furnish and install the draperies and drapery hardware.

The department stores or other sellers furnishing resale certificates are required to pay the tax to the state upon their selling price of the draperies and drapery hardware, exclusive of installation charges. The installer should segregate his or her installation charge in order that the department store or other seller may properly segregate its charge attributable to installation for purposes of determining its taxable gross receipts.

(2) **PREFABRICATED CABINETS.** A cabinet will be considered to be “prefabricated” and a “fixture” when 90 percent of the total direct cost of labor and material in fabricating and installing the cabinet is incurred prior to affixation to the realty. In determining this 90 percent, the total direct cost of all labor and materials in fabricating the cabinet to the point of installation will be compared to the total direct cost of all labor and materials in completely fabricating and installing the cabinet. If more than one cabinet is fabricated and installed under the contract, each cabinet will be considered separately in determining whether the cabinet is prefabricated.

(3) **PREFABRICATED BUILDINGS.** Prefabricated units such as commercial coaches, house trailers, etc., registered with the Department of Motor Vehicles or the Department of Housing and Community Development, are tangible personal property even though they may be connected to plumbing and utilities. A mobile home which meets or is modified to meet, all applicable building codes and regulations and which is permanently affixed to realty, is an improvement to realty and is not personal property. A contract to furnish and install a prefabricated or modular building which is not a factory-built school building (relocatable classroom) is a construction contract whether the

building rests in place by its own weight or is physically attached to realty. It is immaterial whether the building is erected upon or affixed to land owned by the owner of the building or is leased to the landowner or lessee of the land.

Generally, a contract to furnish and install a small prefabricated building, such as a shed or kiosk, which is movable as a unit from its site of installation, is a construction contract only if the building is required to be physically attached to real property by the seller, upon a concrete foundation or otherwise. The sale of such a unit to rest in place by its own weight, whether upon the ground, a concrete slab, or sills or piers, is not a construction contract even though the seller may deliver the unit to its site of use.

Prefabricated or modular buildings which are “factory-built housing” where permanently affixed to the realty are improvements to realty. The manufacturer of factory-built housing who contracts to furnish and install the factory-built housing manufactured by him or her is the consumer of the materials used in building and installing the factory-built housing and the retailer of the fixtures. Tax applies as provided in (b) above.

(4) FACTORY-BUILT SCHOOL BUILDINGS.

(A) General. On and after September 26, 1989, a contract to furnish and install a factory-built school building is not a construction contract but rather is a sale of tangible personal property.

(B) Definitions.

1. “Factory-built School Building.” The term “factory-built school building” (relocatable classroom) means and includes:

A. for the period September 26, 1989 through September 12, 1990, any building designed to be used as a school building as defined in Sections 39214 and 81165 of the Education Code and so used. A factory-built school building must be designed in compliance with state laws for school construction and approved by the structural safety section in the office of the State Architect. It must be wholly or substantially manufactured at an offsite location for the purpose of being assembled, erected, or installed on a school site.

B. effective September 13, 1990, any building which is designed or intended for use as a school building and is wholly or substantially manufactured at an offsite location for the purpose of being assembled, erected, or installed on a site owned or leased by a school district or a community college district. A factory-built school building must be designed and manufactured in accordance with building standards adopted and approved pursuant to Chapter 4 (commencing with Section 18935) of Part 2.5 of Division 13 of the Health and Safety Code and must be approved by the structural safety section in the office of the State Architect.

The term does not include buildings licensed by either the Department of Motor Vehicles or the Department of Housing and Community Development. The term also does not include prefabricated or modular buildings which are similar in size to, but which are not, “factory-built school buildings”. It is immaterial whether the building is erected upon or affixed to land owned by the owner of the building or is leased to the landowner or lessee of the land.

2. "Consumer."

A. For the period September 26, 1989 through September 12, 1990, the term "consumer" as used herein means either (1) a school or a school district or (2) a contractor who purchases a factory-built school building for the purpose of fulfilling the requirements of an existing contract with a school or school district to furnish and install such building.

B. Effective September 13, 1990, the term "consumer" as used herein means either (1) a school district or a community college district or (2) a contractor who purchases a factory-built school building for the purpose of fulfilling the requirements of an existing contract with a school district or a community college district to furnish and install such building.

(C) Place of Sale. The place of sale or purchase of a factory-built school building is the place of business of the retailer regardless of whether the sale of the building includes installation or whether the building is placed upon a permanent foundation.

(D) Application of Tax.

1. Tax applies to 40 percent of the sales price of the building to the consumer excluding any charges for placing the completed building on the site. The sales price of the building shall include amounts representing tangible personal property installed in the building by a subcontractor, whether prior to or after installation of the building at the site, provided such installation is called for in the prime contract for the building.

A separate contract to furnish and install tangible personal property in a factory-built school building after installation of the building at the site is a construction contract and tax applies as in (b) above. Any contract or subcontract for site preparation (e.g., foundation) is a construction contract and tax applies as in (b) above.

2. The sale of a factory-built school building to a purchaser who will resell the building without installation is a sale for resale and the seller may accept a resale certificate from the purchaser. If the purchaser then sells to a contractor who has an existing contract to install the building on a school site, tax will apply as in (c)(4)(D)1. above. If tax has been paid on the purchase price of a factory-built school building which is subsequently resold for installation, a tax-paid purchases resold deduction may be taken as provided in Regulation 1701 (18 CCR 1701).

(E) Exclusion Certificate. For the period September 26, 1989, through September 12, 1990, if the purchaser certifies in writing to the retailer that the factory built school building purchased will be consumed in a manner or for a purpose entitling the retailer to exclude 60% of the gross receipts or sales price from the measure of tax and uses the property in some other manner or for some other purpose, the purchaser shall be liable for payment of tax measured by 60% of the sales price. For the above stated period, all retailers who made retail sales of "factory-built school buildings" claimed to be subject to tax measured by 40 percent of the sales price must obtain from the "consumer" a signed certificate substantially in the form set forth below.

**CLAIM FOR 60% EXCLUSION FROM TAX ON
PURCHASE OF FACTORY-BUILT SCHOOL BUILDINGS**
(Sec. 6012.6, Rev. & Tax. Code)

I hereby certify that the factory-built school building that I

(Name of Purchaser-Consumer)

am purchasing under the authority of this certificate from

(Name of Retailer)

will be used as a school building as defined in Sales and Use Tax Regulation 1521. My seller's permit number, if any, is _____.

I further certify that I understand and agree that if the property purchased under the authority of this certificate is used by the purchaser for any purpose other than indicated above, the purchaser shall be liable for payment of tax to the State Board of Equalization at the time of such use measured by 60% of the sales price of the factory-built school building.

Signed by _____
(Name of Purchaser)

As: _____
(Owner, Partner, Purchasing Agent, etc.)

Date _____

(5) MOBILEHOMES INSTALLED FOR OCCUPANCY AS RESIDENCES.
Operative July 1, 1980, a special measure of sales or use tax is provided for a mobilehome sold to be affixed to realty for occupancy as a residence.

A mobilehome dealer who sells a new mobilehome to a construction contractor to be affixed to land for occupancy as a residence is the "retailer-consumer" of the property and is required to pay tax for the period in which the sale was made by the dealer measured by an amount equal to 75 percent of the retailer-consumer's purchase price of the mobilehome.

A construction contractor who withdraws a new mobilehome from an inventory purchased for resale to be affixed to realty for occupancy as a residence in the performance of a construction contract is required to pay tax measured by 75 percent of the purchase price by his or her mobilehome vendor except where the purchase is made directly from a mobilehome manufacturer. In the absence of satisfactory evidence of the vendor's purchase price it shall be presumed that the measure of tax for the transaction is an amount equivalent to 60 percent of the sales price of the mobilehome to the construction contractor.

A mobilehome manufacturer who sells a new mobilehome directly to a construction contractor for installation to real property for occupancy as a residence is required to pay tax measured by 75 percent of the sales price at which a similar mobilehome ready for installation would be sold by the manufacturer to a retailer-consumer in this state. A

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construction contractor who withdraws a new mobilehome from an inventory purchased from a manufacturer for resale must pay tax measured by 75 percent of his or her purchase price.

A mobilehome manufacturer who performs a construction contract by permanently affixing a new mobilehome to real property is the consumer of the material and the retailer of fixtures installed by him or her and the tax applies as set forth in paragraph (b) above.

Reference should also be made to the provisions of Regulation 1610.2 for additional interpretative rules relating to custom additions to the mobilehome prior to sale, transfers of non-vehicle items, and the application of the tax to a purchase made from an out-of-state retailer.

(6) **REPAIR CONTRACTS.** A contract to repair a fixture in place or a fixture the contractor is required by the contract to reaffix to the realty is a construction contract. Sales or use tax applies to the gross receipts or sales price of the parts sold by a contractor who is a retailer under this provision. Either sales tax or use tax applies to the sales price of the parts sold to or used by a contractor who is a consumer under this provision.

(A) **United States Construction Contractors.** A United States construction contractor is the consumer of the parts furnished in the performance of a construction contract to repair a fixture.

(B) **Construction Contractors Other Than United States Construction Contractors.**

1. A contractor is the retailer of the parts furnished in the performance of a construction contract to repair a fixture when the sale price of the parts is billed separately from the repair labor.

2. A contractor is the consumer of the parts furnished in the performance of a lump sum construction contract to repair a fixture.

(7) **ELEVATOR INSTALLATIONS.** A large number of components are included in the installation of an elevator system. Those portions constituting the cage or platform and its hoisting machinery are fixtures. The balance of the installation, if attached to a structure or other real property will generally be "materials."

Similarly, installation of escalators and moving sidewalks are in part fixtures and in part materials.

Following are examples of components constituting part of the cage or platform and its hoisting machinery, and which are fixtures:

alarm bell	door operator on cab or	power units and control
cab or car	car	boxes
car doors	door safety edge on cab	pumps
car platform and sling	door sills on cab	push buttons on cab
door hanger on cab	electronic door protector	wire and piping (which
door openers	jack assembly	are components of a
	motors	fixture)

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Following are examples of components constituting “materials” when attached to realty:

car guides	hoistway door sills and	sound insulating panels
casing section of jack	jams	on “materials”
assembly	hoistway door supports	structural steel (unless
guide rails	hoistway entrance	part of cab, car, or other
hoistway doors	pushbuttons on hoistway	“fixture”)
hoistway door frames	rail brackets	valve strainer
hoistway door safety	sills, struts	wire and piping attached
edge		to “materials”

Following are examples of components constituting parts of escalators or moving sidewalks which are fixtures:

staircase	chains	other operating
moving sidewalk	sprockets	mechanisms
moving handrails	motors	

(8) TELEPHONE SWITCHBOARDS AND INSTRUMENTS. Telephone switching equipment installed in a building specifically designed to accommodate the equipment or attached to a building or structure in a manner such that its removal would cause damage to the equipment or building in which it is installed will be considered to be “fixtures” under paragraph (a) (5) of this regulation.

Telephone handsets, modular switching equipment and standardized, off-shelf, general purpose switching equipment sold for use in general purpose office buildings constitute machinery and equipment under paragraph (a) (6) of this regulation. Handsets, modular switching equipment and standardized equipment were previously classified as fixtures.

This change in classification shall be applied prospectively only with respect to construction contracts entered into on and after July 1, 1988, by contractors other than United States construction contractors.

(9) DEEP-WELL AGRICULTURAL PUMPS. A deep-well agricultural pump is tangible personal property if installed so that it rests in position by force of gravity and is not otherwise affixed to the land.

The pump is a fixture if:

- (A) It is affixed to the land such as by concrete, bolts or screws,
- (B) It is physically connected to an irrigation system such as by pipes or couplings so as to become an integral part of the system, or
- (C) It is enclosed by a pump house or other building or structure.

(10) REMOTE CONTROL GARAGE DOOR OPENERS. Remote control garage door opening units are fixtures. Portable transmitter units furnished pursuant to a construction contract are deemed to be fixtures and are taxable as provided in subdivision (b)(2)(B). Sales of portable transmitter units not a part of a construction contract, as, for example, sales of replacement units, are retail sales of tangible personal property and subject to tax as such.

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(11) EXCESS REIMBURSEMENT. The excess tax reimbursement provisions of Regulation 1700 apply to construction contractors.

(12) ON-PREMISE ELECTRIC SIGNS.

(A) An on-premise electric sign is any electrically powered or illuminated structure, housing, sign, device, figure, statuary, painting, display, message, placard, or other contrivance or any part thereof affixed to real property and intended or used to advertise, or to provide data or information in the nature of advertising, for any of the following purposes: 1) To designate, identify, or indicate the name or business of the owner or occupant of the premises upon which the advertising display is located, or 2) To advertise the business conducted, services available or rendered, or the goods produced, sold, or available for sale, upon the property where the advertising display has been erected.

(B) **Application of Tax.** An on-premise electric sign is a fixture and tax applies to the sale price of the sign. Notwithstanding the provisions of 1521(b)(2)(B), operative October 1, 2000, if the contract does not state the sale price of the sign, tax applies to 33 percent of the contract price of on-premise electric signs that are furnished and installed by the seller. "Contract price" includes charges for materials, fabrication labor, installation labor, overhead, profit, and other charges associated with the sale and installation of the sign. If a contract provides that a contractor is to install an on-premise electric sign furnished by a third party, the charges for installation are not taxable. If a seller furnishes but does not install an on-premise electric sign, the seller is a retailer of the sign and tax applies to the total contract price.

Separately stated charges for transportation are subject to tax as defined in Regulation 1628, *Transportation Charges*.

Appendix A. The following is a list of typical items regarded as materials:

Asphalt	Linoleum	Sand
Bricks	Lumber	Sheetmetal
Builders' hardware	Macadam	<u>Solar Panel</u>
Caulking Material	Millwork	Steel
Cement	Mortar	Stone
Conduit	Oil	Stucco
Doors	Paint	Tile
Ducts	Paper	Wall coping
Electric wiring and connections	Piping, valves, and pipe fittings	Wallboard
Flooring	<u>Photovoltaic Cell</u>	Wallpaper
Glass	Plaster	Wall-to-wall carpeting (when affixed to the floor)
Gravel	Power poles, towers, and lines	Weather stripping
Insulation	Putty	Windows
Lath	Reinforcing mesh	Window screens
Lead	Roofing	Wire netting and screen
Lime		Wood preserver

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Appendix B. The following is a list of typical items regarded as fixtures:

Air conditioning units	Elevators, hoists, and conveying units
Awnings	Furnaces, boilers, and heating units
Burglar alarm and fire alarm fixtures	Lighting fixtures
Cabinets, counters, and lockers	Plumbing fixtures
(prefabricated)	Refrigeration units
Cranes (including moving parts of	Signs
cranes) affixed or annexed to a building,	Television antennas
structure or fixed work) ¹	Transformers and switchgear
Electric generators (affixed to and	Vault doors and equipment
accessory to a building, structure or	Venetian blinds
fixed works)	

Appendix C. The following are lists of typical items regarded as:

Machinery and Equipment

Drill presses
Electric generators (unaffixed, or, if
affixed, which meet the requirements of
subparagraph (a)(6))
Lathes
Machine tools
Printing presses

Not Machinery or Equipment

Fixtures and materials as defined in this
regulation
Wiring, piping, etc., used as a source of
power, water, etc., for machinery and
equipment
Radio transmission antennas
Large tanks (i.e., over 500 barrel
capacity)
Fire alarm systems
Street light standards
Cooling towers other than small
prefabricated cooling units

History: Effective July 1, 1939.

Adopted as of January 1, 1945, as a restatement of previous rulings.

Amended September 2, 1965, applicable as amended September 17, 1965.

Amended and renumbered November 3, 1971, effective December 3, 1971.

Amended February 4, 1976, effective April 1, 1976. Rewrote and expanded
regulation for clarity, combined Regulation 1615, added particular
applications, and applied Regulation 1521 definition of “fixture” to U.S.
Contractors.

Amended August 17, 1976, effective September 19, 1976. Clarified “U.S.
Government”, limited exemption certificate, and clarified “generators” in
appendices.

Amended December 7, 1978, effective February 18, 1979. Subsections (a)(3),
(b)(1)(A), and (b)(1)(B) no longer reference instrumentalities of the United
States; subsection (b)(1)(A) was amended to apply sales tax to the sale of
tangible personal property to contractors for use on construction contracts
with the United States; amends subsection (c)(7) to provide that the section
only applies to transactions prior to 1/1/79.

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Amended August 1, 1980, effective August 22, 1980, operative July 1, 1980. On first page, added (c) (4) and re-numbered following subsections; in (c) (3), first sentence, deleted “mobile homes” and substituted “commercial coaches”; in third paragraph, deleted “as defined in Regulation 1521.2,” from first sentence, and deleted second sentence; added (c) (4), and renumbered following sections.

Amended November 19, 1980, effective January 16, 1981. In (c)(3) corrected typographical error. In (c)(4), third paragraph, substituted “construction contractor” for “any person,”; added “in the performance of a construction contract,” and added exception for purchases made directly from a mobilehome manufacturer; substituted “construction contractor” for “person withdrawing and affixing the property to realty,”. In fourth paragraph, added provision re withdrawal by construction contractor of new mobilehome from inventory purchased from a manufacturer.

Amended December 1, 1983, effective April 14, 1984. In (c)(3) added reference to the Department of Housing and Community Development. In (c) added new (c)(8) and renumbered former (c)(8) to (c)(9); deleted former text and added reference to Regulation 1700. Deleted former subdivision (d). In appendix C changed reference to subparagraph (a)(6).

Amended February 5, 1986, effective May 11, 1986. Deletes the term “Moving parts of cranes” as machinery and equipment under Appendix C and adds the term “Cranes” to Appendix B as fixtures with a footnote that moving parts of cranes are classified as machinery and equipment when furnished and installed pursuant to fixed price construction contracts entered into prior to July 1, 1985.

Amended May 3, 1988, effective July 2, 1988. Added subdivision (c) (7) to make clear and specific that certain types of telephone equipment are classified as “fixtures” whereas other types of telephone equipment are classified as “machinery and equipment”. In Appendix B, deleted reference to “telephone switchboards and instruments”.

Amended April 5, 1989, effective June 17, 1989. The change to subdivision (c)(3) provides that construction contracts include contracts to furnish and install a relocatable classroom, or other prefabricated or modular building of similar size, whether the building rests in place by its own weight or is physically attached to the realty. The revised subdivision also provides that a contract to furnish and install a small prefabricated building such as a shed or kiosk, which is moveable from its installation site, is a construction contract only if the building is required to be physically attached to the realty by the seller.

Amended June 5, 1991, effective August 18, 1991. Modified the definition of the term “factory-built school building” and deleted the provisions relating to the liability of the purchaser for taxes if the building is used for some purpose other than a school. Amended paragraph (c)(3) to remove reference to factory-built school buildings (relocatable classrooms). Added paragraph (c)(4).

Amended February 8, 1995, effective July 16, 1995. Amended subparagraph (c)(6) to include, as subparagraphs (A) and (B), specific examples of how tax

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applies to both United States contractors and other construction contractors when performing repair construction contracts. Deleted gender-based language from subparagraphs (a)(2) & (3), (b)(2)(A)2., (b)(2)(B)2.b., (b)(4), (b)(6), (c)(3), and (c)(5). Corrected clerical errors in (c)(3) and (c)(4)(E). Amended November 18, 1998, effective February 13, 1999. Subdivision (a)(2) amended by adding sentence “ ‘Construction contractor’ . . . country.” Amended April 5, 2000, effective June 17, 2000. Added subdivision (c)(12) to explain the application of tax to on-premise electric signs, as defined.

¹ Moving parts of cranes are classified as machinery and equipment when furnished and installed pursuant to fixed price construction contracts entered into prior to July 1, 1985.